



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER  
ATTORNEY GENERAL

Daniel P. Bach  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
www.doj.state.wi.us

Thomas Balistreri  
Assistant Attorney General  
balistreritj@doj.state.wi.us  
608/266-1523  
FAX 608/267-2223

December 9, 2004

Mr. Steven M. Gloe  
General Counsel  
Department of Regulation and Licensing  
1400 East Washington Avenue  
Madison, WI 53702

Dear Mr. Gloe:

You have asked the Attorney General's Office to comment on the circumstances in which a dental hygienist may apply dental sealants and fluoride treatments without a dentist authorizing or being present to supervise these procedures. We agree with your memorandum of October 19, 2004, and the memorandum of Daniel D. Stier, Chief Counsel of DHFS, dated April 1, 2004, regarding the circumstances in which a hygienist may independently provide these services.

Whether the application of dental sealants or fluoride treatments must be authorized or supervised by a dentist who is present on the premises depends primarily on where the hygienist provides these services.

The application of both dental sealants and fluoride treatments constitutes the practice of dental hygiene. The application of sealants is expressly defined as the practice of dental hygiene by Wis. Stat. § 447.01(3)(c) (2001-02). The application of fluoride has been added to the list of activities constituting the practice of dental hygiene by Wis. Admin. Code § DE 3.01(2)(e) (2000), under the authority granted to the Dentistry Examining Board by Wis. Stat. §§ 447.01(3)(g) and 447.02(1)(d) (2001-02).

A hygienist may ordinarily practice dental hygiene in a dental office, for a hospital or correctional facility, for a charitable institution, for a home health care agency, or for a dental care program for economically disadvantaged people only as authorized by a dentist who is present in the facility where the procedures constituting the practice of dental hygiene are performed. Wis. Stat. § 447.06(2)(a) and (b) (2001-02).

There are no such restrictions on the practice of dental hygiene for public and private schools, for dental schools or for local health departments. *See id.* So a hygienist may apply sealants or fluoride in these circumstances without the authorization or presence of a dentist. If a

Mr. Steven M. Gloe  
December 9, 2004  
Page 2

type of fluoride is used which is available only by prescription, however, it will have to be obtained under a prescription written by someone other than a hygienist who is legally authorized to prescribe controlled substances. *See* Wis. Stat. § 447.06(2)(d).

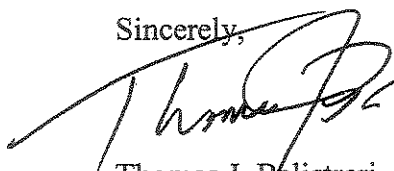
Moreover, even in the circumstances where dental hygiene must ordinarily be practiced in the presence of a dentist, a hygienist may apply sealants or fluoride without a dentist being present if these procedures are specifically prescribed orally or in writing by a dentist who has examined the patient within the preceding year, the patient knowingly consents, and, when the procedures are performed in a dental office, the patient has been a patient of the dentist for at least six months. Wis. Stat. § 447.06(2)(c).

An administrative rule of the Dentistry Examining Board appears to impose stricter requirements than the statutes regulating the practice of dental hygiene, providing that a "dental hygienist shall practice under the supervision of a licensed dentist in a dental facility or a facility specified in s. 447.08(4), Stats., if applicable." Wis. Admin. Code § DE 3.01.

However, Wis. Stat. § 447.08 can never be applicable because it has been repealed. 1989 Wisconsin Act 349, § 28. And to the extent that the remainder of the rule may be inconsistent with present Wis. Stat. § 447.06, it would be invalid because an administrative agency cannot promulgate a rule which is inconsistent with an unambiguous statute. *Chvala v. Bubolz*, 204 Wis. 2d 82, 89, 522 N.W.2d 892 (Ct. App. 1996). This is not to say that the rule is invalid since it would be subject to a construction which could resolve any apparent difference with the statute, which in any case is controlling.

In sum, the statutes plainly delineate three circumstances where a dental hygienist may apply dental sealants or fluoride treatments without either the authorization or the presence of a dentist. There are other circumstances where a dental hygienist may apply dental sealants or fluoride treatments with the authorization but without the presence of a dentist.

Sincerely,



Thomas J. Balistreri  
Assistant Attorney General

TJB:ajw